IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 661 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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KESHAVBHAI DAYALBHAI PRAJAPATI

Versus

VANMALIBHAI GOSAIBHAI PRAJAPATI

Appearance:

1. Appeal from Order No. 661 of 1999

MR DR DHIMAR for Petitioner No. 1-2

MR DHIRENDRA MEHTA for Respondent No. 1-2

NOTICE SERVED BY DS for Respondent No. 3-4

UNSERVED-EXPIRED (N) for Respondent No. 5

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 07/09/2001

ORAL JUDGEMENT

1. The appellants are the original defendants No.1 &

2. They have filed this Appeal against the impugned order dated 31.7.1999 passed by the learned trial Judge below Ex.5 in Special Civil Suit No.238 of 1996 whereby the

learned Judge allowed the Application Ex.5 and modified the ex-parte ad.interim order of status-quo dated 19.7.1996 and restrained the defendant from interfering with 2/3 share of the plaintiff in land in question and also restrained the defendant from giving 2/3 share of the plaintiff in the land of any other person by transfer or by any other mean.

2. Learned Counsel shri Dhimar for the appellant original defendant frankly conceded that he is not challenging the part of the impugned order passed by the learned trial Judge whereby they were restrained from transferring 2/3 share of the land in question to any other person during pendency of the Suit. However, he is challenging the part of the operative order whereby the defendants were restrained from interfering with the possession of 2/3 share of the plaintiff in the land in question as according to him the defendants were and are in possession of the said land in question and they were cultivating the land since long. However, learned Counsel Shri Dhirendra Mehta for the respondents No.1 & 2 original plaintiff submitted that the learned Judge has rightly restrained the defendants from interfering with the 2/3 share of the plaintiffs in land in question. He submitted that the impugned order was passed on 31.7.1999 whereas this Appeal from Order was filed late in January, 2000 and so far only order of notice was issued and no interim relief was granted on Civil Application filed in this Appeal from Order. He, therefore, submitted that the interim order passed by the trial Judge should not be interfered.

3. The plaintiffs, present respondents No.1 & 2, filed Special Civil Suit No.238 of 1996 against six defendants for declaration and injunction in 1996. Along with the Suit Application Ex.5 was filed on 18.7.1996 below which the learned Judge passed ex-parte order of status-quo on 19.7.1996 regarding the property in question upto 3.8.1996. The same was extended from time to time and ultimately it was modified on 31.7.1999 by the impugned order passed by the learned Judge.

4. When the learned Counsel Shri Dhimar for the appellants original defendant Nos.1 & 2 has not challenged the part of the impugned order passed by the learned Judge regarding transferring the possession of the 2/3 share of the land in question to any one else then I am not required to consider the same. However, there is serious challenge to the part of the impugned order passed by the learned Judge whereby he restrained the defendants from interfering with the possession of

the 2/3 share of the land in question. The averments made in Para : 8 of the Application Ex.5 which I would like to reproduce, which is as under :

This shows that though the land may be in the joint name in revenue record of plaintiff as well as the defendants, but the said land was cultivated by the defendants, otherwise there was no need for the plaintiff to make prayer regarding appointing the Receiver.

5. Similarly, alternative prayer made by the plaintiffs in Para : 9(2) of Application Ex.5 makes interesting reading of it whereby it was prayed that in the alternative Receiver be appointed for taking accounts of the income which is received by the defendants while cultivating the land and selling crop of sugar cane, Bananas, etc. every month.

6. Thus, when the defendants were admittedly in possession of the entire land in question and that they were cultivating the land then there was no question of issuing injunction against them from interfering with 2/3 share of the plaintiffs. Thus, though there may be a prima facie case in favour of the plaintiff, but the balance of convenience was never in their favour. I would not like to go into the point raised before me that the plaintiffs are staying abroad since long and they never cultivated the land and the said land was always cultivated by the defendant - present appellant. However, on the strength of their own pleading they would not be entitled for modifying the relief granted in their favour by the learned Judge. In fact it appears that earlier ex-parte order of status-quo was just and proper whereby the defendants were restrained from transferring the possession of the land in question to any one else till the final disposal of the suit and they were permitted to cultivate the land.

7. In view of above discussion this Appeal is partly allowed. The impugned order passed by the learned Judge restraining the appellants - defendants from giving 2/3 share of the plaintiff of the land in question to any one else by transfer or any other means is hereby confirmed. However, part of the operative order passed by the

learned Judge restraining the appellant - defendant from interfering with 2/3 share of the land in question is hereby set aside. The Appeal is allowed to the aforesaid extent only.

8. At this stage request is made by Shri Mehta for the respondent - original plaintiff to permit them to make suitable application before the trial Court for taking account of the produce of the land which is taken by the defendant. Mr.Dhimar can not have any objection to this request. As and when such application is made before the learned trial Judge, the learned trial Judge shall consider and decide the same in accordance with law.

As the Appeal from Order is disposed of, Civil Application No.No.1213/2000 would not survive. Hence, the same is disposed of accordingly.

sd/-

Date : September 07, 2001 (B.J.Shethna, J.)

sas